Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

S. MICHAEL BENDER,
Petitioner,

v.

JON W. DUDAS, Director,
Patent and Trademark Office,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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December 26, 2007

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QUESTIONS PRESENTED

This case is an unprecedented attorney discipline proceeding brought by the United States Patent and Trademark Office ("PTO") against Petitioner "to remove him from the rolls" under § 32 of the patent statute. The PTO issued a Final Order *excluding* Petitioner following an administrative proceeding under § 556 of the Administrative Procedures Act ("APA"). None of the alleged grounds of misconduct upon which the PTO's Final Order is based constitutes conduct or practice, or relates to conduct or practice, "before the Office." Rather the alleged infractions in this case relate to Petitioner's communications with his clients, or with an invention marketing company and, if at all, are subject to disciplinary action exclusively by State Bar Authorities where Petitioner is admitted (i.e. New Jersey and the District of Columbia). The broadest specific power conferred by Congress upon the PTO is set forth in 35 U.S.C. § 2(b)(2)(A) and comprises "establishing regulations which shall govern *the conduct of proceedings in the Office*" (emphasis supplied). Similarly, the disciplinary regulations promulgated under the statute are limited to "*solely* the practice of patent, trademark and other law *before the Patent and Trademark Office*" (37 CFR § 10.1) (emphasis supplied). The Court of Appeals for the Federal Circuit ("Federal Circuit") upheld the PTO's exclusion order against Petitioner's challenge that the PTO's action exceeds authorization by Congress, is unsupported by substantial evidence, and violates the U.S Constitution or otherwise is contrary to law.

The questions presented are as follows:

1. Is the PTO's authority to discipline practitioners before that agency limited by the broadest powers conferred by Congress, and if so, does the PTO's Final Order in this case *excluding* Petitioner for infractions not related "solely" to "conduct or practice before the Office" violate Amendments V and X of the Federal Constitution?

2. A ground of misconduct in this case alleges that Petitioner was "evasive" in answering questions posed in a Requirement For Information ("RFI") issued by the PTO during its investigation. Is the PTO's use of RFIs during the investigative phase of a disciplinary proceeding violative of Amendment V of the U.S. Constitution where, as here, such RFI contains the threat of a disciplinary proceeding being invoked under § 32 of the Patent Act in the event of non-compliance? The Fourth Circuit Court of Appeals in a prior case, *Goldstein v. Moatz*, 364 F.3d 205 (4th Cir. 2004), held the same disciplinary RFI practice in the PTO "utterly lacked procedural safeguards," that "the denial of any avenue of challenge, and the threats of charges for non-compliance, are indicative of a system lacking sufficient procedural safeguards," and that the RFI constituted "improper discovery" not permitted under any disciplinary rule. The Federal Circuit in this case, reaches a contrary conclusion condoning the PTO's use of such disciplinary RFIs thereby creating an irreconcilable conflict between the two Circuit Courts.

3. The Administrative Law Judge ("ALJ") *sua sponte* held that certain specific questions in the PTO's investigative RFI were "evasively answered" by Petitioner and the PTO adopted this finding in its

Final Order. Whether or not these specific questions were answered "evasively" was not litigated during the administrative hearing and the government produced no evidence of any kind in support of this finding. Does it violate Petitioner's due process rights and the "notice" requirements of the APA where as here, the complaint is amended *post hoc* essentially to add a new charge against which Petitioner had no opportunity to defend during the administrative hearing below?

4. In this case, the same agency employee who investigated Petitioner for alleged disciplinary infractions was promoted to Director of the PTO's Office of Enrollment and Discipline ("OED"). As Director of OED, and promptly following his promotion, that same employee "initiated" the underlying § 32 proceeding ultimately leading to the agency's exclusion order. Does the employment of a single agency official charged with both investigating and subsequently "initiating" an ensuing administrative proceeding based upon that investigation violate the "separation of functions" clause of the APA (§ 554(d)(2)) and Amendment V of the Constitution?

5. Each of the alleged "core" infractions underlying the PTO's exclusion order accrued more than five (5) years prior to the date the § 32 proceeding in this case was filed. The patent statute does not contain any Statute of Limitations with respect to disciplinary proceedings. Under the APA (5 U.S.C. § 706(2)), the reviewing court is required to "hold unlawful and set aside agency action ... found to be ... arbitrary, an abuse of discretion, or *otherwise not in accordance with law*" (emphasis added). Does the Federal Statute of

Limitations set forth in 28 U.S.C. § 2462 apply to this case, and if so, is the PTO's Final Order "otherwise not in accordance with law?"

RULE 14.1 STATEMENT

Petitioner (plaintiff-appellant below) is S. Michael Bender.

Respondent (defendant-appellee below) is Jon W. Dudas in his capacity as Under Secretary of Commerce and Director of the United States Patent and Trademark Office.

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PETITION FOR WRIT OF CERTIORARI

Petitioner S. Michael Bender respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Appendix (App.) *infra*. 1a-20a) is reported at *Bender v. Dudas*, 490 F.3d 1361 (Fed. Cir. 2007). The order of the court of appeals denying Petitioner's petition for rehearing and rehearing *en banc* (App. *infra*. 84a-85a) is unreported. The district court decision (App. *infra*. 84a-85a) is reported at *Bender v. Dudas*, 2006 U.S. Dist. LEXIS 2562 (D.D.C. Jan. 13, 2006). The PTO orders excluding Petitioner and denying Petitioner's request for reconsideration are part of the administrative record of the PTO.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2007. Petitioner's timely petition for rehearing and rehearing *en banc* was denied September 27, 2007. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment of the U.S. Constitution provides:

"No person shall be ... deprived of life, liberty, or property, without due process of law..."

The Tenth Amendment of the U.S. Constitution provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."

35 U.S.C. § 2(b)(2)(A), in pertinent part provides:

"The United States Patent and Trademark Office ... may establish regulations, not inconsistent with law, which shall govern the conduct of proceedings in the Office."

35 U.S.C. § 2(b)(2)(D) in pertinent part provides:

"The United States Patent and Trademark Office ... may establish regulations, not inconsistent with law, which may govern the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office..."

35 U.S.C. § 32 in pertinent part provides:

"The Director may, after notice and an opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before the Patent and Trademark Office, any person, or agent, or attorney shown to be incompetent or

disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under section 2(b)(2)(D) of this title..."

37 CFR § 10.1 in pertinent part provides:

"This part governs solely the practice of patent, trademark, and other law before the Patent and Trademark Office. Nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law, except to the extent necessary for the Patent and Trademark Office to accomplish its federal objectives."

5 U.S.C. § 554(d)(2) in pertinent part provides:

"An employee or agent engaged in the performance or investigation or prosecuting function for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title."

5 U.S.C. § 706(2) in pertinent part provides:

"... hold unlawful and set aside agency action ... found to be ... arbitrary, an abuse of discretion, or otherwise not in accordance with law."

28 U.S.C. § 2462 in pertinent part provides:

> "An action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

STATEMENT

Introduction. This case has implications going beyond a practitioner facing disbarment because allegedly he acted unethically. It is about an overarching attempt by a federal agency (PTO) to gain oversight over so-called "invention marketing companies" by preventing practitioners from accepting customers referred by such firms. If that attempt succeeds, the PTO will effectively put invention marketing companies out of business. That this is a strong policy objective of the PTO is beyond doubt. Prior to initiating the administrative proceeding below, the then Commissioner of Patents, Mr. Q. Todd Dickinson, was quoted in an article in the Wall Street Journal[1] relating to invention marketing firms: "[T]hey're like weeds or cockroaches ... we need to be more aggressive in stamping them out ..." The article then states "The patent office said it had plans to be *more aggressive in revoking the license of patent attorneys* who violate ethics rules" (emphasis added). Among such "plans" is a proposed rule[2] containing a

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[1] March 16, 1999, page B2.

[2] Federal Register, Vol. 68, No. 239, Friday, December 12, 2003, Proposed Rules, pages 69442 et seq.

new, expanded Disciplinary Code (37 CFR Part 11), which, *inter alia*, contains rules making it a *per se* violation to represent clients referred by invention developers.[3] Another plan includes the present action seeking to *exclude* Petitioner in order to send a message to the Patent Bar that invention company clients are "off limits." Thus, in the "Background" section of the Complaint filed by the PTO in this case,[4] the Director of OED states: "Respondent engaged in business relationships with a number of invention submission companies ..." and further: "One or more of the invention submission companies referred a number of inventors ... to Respondent."

Regulating the "business relationships" between practitioners and invention marketing firms is not a "federal objective" of the PTO. Congress has given the PTO general power under 35 U.S.C § 2(a)(1) merely to "grant and issue patents and register trademarks," and the specific power under section 2(b)(2)(A) to "... establish regulations, not inconsistent with law, which shall govern the conduct of proceedings in the Office." In *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 402 (1963), the Court held that the PTO's right to preempt state law with respect to regulating the conduct of attorneys is limited by the PTO's "federal objectives" which in turn, are incidental to the preparation and prosecution of patent applications before the Office. Following *Sperry*, the PTO established its current disciplinary rules which are

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[3] See, for example, proposed rules §§ 11.804(h)(3)(i)-(vi) and 11.504(b).

[4] Complaint dated June 20, 200. See App. infra. page 23a.

limited to: "... solely the practice of patent, trademark, and other law *before the Patent and Trademark Office*" (37 CFR § 10.1). The ethics rules which are alleged to have been infringed by Petitioner all relate to his business relationship with an invention marketing company, or to private communications with his clients; they do not relate to the practice of patent and trademark law "before the Office," i.e. they are outside the "federal objectives" of the PTO. Indeed, in prior litigation, the Federal Circuit held that with respect to the merits of the patent applications corresponding to the subject matter of this case, Petitioner fulfilled his obligations well in representing his clients "before the Office." *In re Daniels*, 144 F.3d 1452, 1453 (Fed. Cir. 1998).

The PTO disciplinary code gives the PTO Director of OED the power to investigate suspected infractions before initiating a § 32 administrative proceeding. Such investigations typically are carried out through the use of "interrogatories" euphemistically referred to by the PTO as "Requirements for Information" (OED RFIs). In the present case, more than about twenty (20) such OED RFIs were directed at Petitioner during the 5 year period commencing from the time the PTO learned Petitioner was accepting clients from an invention marketing company. In separate litigation, another practitioner brought a "Bivins" action against the same OED investigator in this case challenging the use of such RFIs by that investigator and the PTO on constitutional grounds. In that case, *Goldstein v. Moatz*, 364 F.3d 205 (4th Cir. 2004), the Fourth Circuit ruled that the subpoenas (RFIs) "utterly lacked procedural safeguards," "denied any avenue of challenge," and "contained threats of charges for non-

compliance," all of which indicated a system "lacking sufficient procedural safeguards." The *Goldstein* court after carefully analyzing the PTO's disciplinary regulations enacted under 35 U.S.C. §§ 2(b)(2)(A) and 2(b)(2)(D), further concluded that the RFIs employed by OED during the investigative stage were "improper discovery" because the enacted rules permit RFIs only in connection with patent applications, and that *discovery of a Respondent in disciplinary cases* is permitted only after a § 32 proceeding is brought and then, and only then, under the supervision of an Administrative Law Judge. In the present case, the Federal Circuit erroneously declined to adopt the reasoning of the Fourth Circuit in *Goldstein* raising an irreconcilable conflict over the use of the OED RFIs by the PTO. That conflict now is in need of resolution.

As this Court stated in *In re Ruffalo*, 390 U.S. 544, 551 (1968), disbarment proceedings are "quasi-criminal" in nature and therefore, the charge must be known before the proceedings commence. In *Dickinson v. Zirko*, 527 U.S. 150 (1999), this Court ruled that the PTO is a "federal agency" governed by the provisions of the Administrative Procedures Act, 5 U.S.C. § 500 et seq., (the "APA"). In its zeal to disbar Petitioner in an effort to "send a message not to deal with invention marketing companies," the PTO violated provisions of the APA and thereby infringed Petitioner's Fifth Amendment procedural due process rights. In this respect, the PTO *sue sponte* found Petitioner's answers to a small number of specific questions in an OED RFI to have been "evasively answered" despite the fact that Petitioner had no notice of these specific questions before the § 32 administrative hearing as required under § 556 of the APA, and the issue of "evasive

answers" of any kind whatsoever never was litigated during the hearing. Additionally, the PTO failed to file the underlying administrative proceeding under § 32 until about 6 years after the charged core violations accrued. The undue delay in this case resulted in extreme prejudice to Petitioner because *inter alia* the PTO employee who investigated Petitioner throughout the 6-year period was promoted to OED Director and in that elevated capacity, that same employee initiated the § 32 proceeding. By "initiating" the administrative proceeding in this case, that same employee "participated" in the PTO's Final Order of exclusion, and thus, a single PTO employee "investigated and participated" in the underlying administrative proceeding in violation of § 554(d)(2) of the APA. Finally, § 706(2) of the APA, defines the scope of judicial review of final decisions by the PTO and requires the reviewing court to set aside any agency order "otherwise not in accordance with law." The alleged core violations upon which the PTO's exclusion order is grounded all accrued more than 5 years prior to the initiation of the administrative proceeding in this case. That order therefore is "otherwise not in accordance with law" because it is "time barred" under the federal Statute of Limitations set forth in 28 U.S.C. § 2462 given that the patent act lacks its own Statute of Limitations.

Petitioner has an unblemished record both before and after the alleged infractions in this case. He has represented more than about two thousand inventors honorably before the PTO over a 42 year career as a registered patent attorney. None of the charges in this case relates to the filing or prosecution of any patent application or to misconduct of any kind "before the

Office." The Federal Circuit's decision sustaining the PTO's exclusion order is "policy driven" aimed at curing the perceived evils of "invention marketing companies." It does not follow law. It is a dangerous precedent. It conflicts with its own prior decisions as well as decisions in other Circuits. And, it infringes the Fifth and Tenth Amendments of the U.S. Constitution.

Factual Background. The present proceeding dates back to 1993 when Petitioner agreed to take over prosecution of portions of the pending case docket of a "suspended" patent practitioner named Leon Gilden, Esq. (herein "Gilden").[5] The PTO's own rules, specifically 37 CFR § 10.158(a)(2), requires a suspended attorney to turn over his active case files to "another practitioner" in order to protect the patent rights of the individual inventors involved. More specifically, Petitioner agreed to assume prosecution responsibility for more than 1,000 *design* patent applications Gilden had filed on behalf of client-inventors referred to Gilden by an invention marketing company named "American Inventors Corporation" (herein "AIC"). The PTO had information that Gilden, or someone in Gilden's office, routinely embellished the drawings in each application with a unique decorative pattern of surface indicia, ostensibly to ensure allowance of each application and avoid a refund of AIC's service fee under a guarantee clause contained

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[5] As shown by the administrative record in the PTO, Attorney Gilden settled his § 32 proceeding by agreeing to a five-month suspension in return for pleading guilty to two counts, viz. (i) failing to cooperate with OED, and (ii) permitting another to affix his signature to a paper filed in the PTO.

in some, but not all of the contracts between each inventor and AIC. Instead of striking the applications on grounds of fraud, the PTO issued Requirements for Information in each of the more than 1,000 design applications seeking to alert each inventor to the "Gilden" situation and obtain information regarding the inventorship of the surface ornamentation and the intention of each inventor with respect to whether a utility application or a design application was contemplated. Petitioner was convinced that under the patent law, the applications could be cured by amending the drawings to delete the added [albeit non-invented] surface indicia, and that either a design patent could be obtained on the unadorned underlying configuration illustrated in the drawings, or a utility patent application could be filed basing its priority upon the amended design patent drawings. See *Rohm & Haas Co. v. Crystal Chemical Co.*, 727 F.2d 1556, 1572 (Fed. Cir. 1983). Petitioner ultimately was proven correct by the Federal Circuit. *In re Daniels*, supra.

At the outset of his representation, and working with outside counsel, Petitioner prepared an engagement letter which he sent with the PTO's RFI to each of the "Gilden" applicants. Petitioner also filed Petitions to the Commissioner of Patents and Trademarks seeking the PTO's cooperation in processing the more than 1,000 Gilden applications. The Petitions forthwith were denied by the PTO.

Soon after the PTO learned of Petitioner's involvement with the Gilden applications and AIC, and motivated by the PTO's strong policy of disciplining patent attorneys who accept referrals from

invention promoters, a disciplinary investigation of Petitioner was caused to ensue with respect to his relationship with Gilden and AIC. The PTO's OED mailed Petitioner the first of what was to become a steady stream of "disciplinary letters" or OED RFIs. In September 1994, more than a year after Petitioner was placed under investigation, the then Deputy Commissioner of Patents and Trademarks, Michael Kirk, appeared before the *Senate Subcommittee on Regulation and Government Information* to publicly express the PTO's efforts in general to discipline patent attorneys having a "relationship" with invention promotion companies, and more specifically, to describe steps already taken to discipline patent attorneys associated with AIC. In that public testimony, Mr. Kirk states: "... bad apples create very bad situations ... The ones that we are dealing with ... are not properly representing their client's interests ... They are working more for the invention development firm and *so we have taken action against them to take them off the rolls.*" (emphasis added.) See App. *infra*. pages 55a-56a.

On June 20, 2000, following Commissioner Dickinson's call for aggressive action in the aforementioned Wall Street Journal article, Petitioner was served with the underlying *Complaint Under 35 U.S.C. § 32*. The document, was signed by Harry I. Moatz, Director OED, the same OED employee in charge of investigating Petitioner. Only two PTO officials appear to have been the decisionmakers in this case on behalf of the agency, namely the aforementioned Harry I. Moatz and Jeffrey Toupin, General Counsel, the author of the Final Decision and of the denial of Petitioner's Request for

Reconsideration. Significantly, the co-authors of the newly proposed PTO disciplinary rules, supra note 2., are the same two decisionmakers.

Found Violations. In the Final Decision, the PTO adopted certain disciplinary rule violations found by the ALJ in the Initial Decision. These include: § 10.23(b)(5) (conduct prejudicial to the administration of justice); § 10.77(c) (neglect); § 10.62(a) (accepting employment without a client's consent, etc.); and § 10.68(a)(1) (accepting compensation from a third party (AIC) without obtaining consent, etc.). With respect to the first charge, the PTO held in the Final Decision that Petitioner was "evasive" answering questions 2.c., 4.a-4.c., 4.f. and 4i in the OED RFI of September 18, 1998.[6] With regard to the second charge, the PTO held in the Final decision that Petitioner was "neglectful" because he "failed to adequately counsel his clients as to the possible inappropriateness of the pending design application," and second "failed to *promptly* notify his clients of final rejections of their applications issued by the PTO." With respect to the third and fourth charges, the PTO held that Petitioner's "business arrangement" with AIC *per se* raised a conflict of interest. In this regard, the PTO held that although receiving consent when he accepted prosecution responsibility for the already filed patent applications, Petitioner failed to make disclosures of certain alleged differing interests before obtaining such consent. The "engagement letters" sent by Petitioner to his clients and which were criticized by the PTO as being inadequate and therefore

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[6] This particular RFI contained approximately 112 questions.

supportive of both the first "neglect" charge and the "conflict of interest" charges; and the notices of Official Actions which allegedly were not sent "promptly enough" thereby supporting the second "neglect" charge; are events that occurred in 1994 or early 1995, more than 5 years before the filing date of the underlying § 32 Complaint.

Proceedings Below. Following an administrative proceeding under 5 U.S.C. § 556, the ALJ on February 11, 2002 issued an Initial Decision excluding Petitioner from practice before the PTO. Petitioner appealed the Initial Decision under 37 CFR § 10.155, and in an order dated September 30, 2003, the PTO issued a Final Decision dramatically reducing the number of charges, but nevertheless, still excluding Petitioner. Petitioner filed a Request for Reconsideration of the Final Decision on November 20, 2003, which was denied July 26, 2004. Petitioner then appealed to the District Court for the District of Columbia which in a decision dated January 13, 2006 granted the PTO's cross-motion for summary judgment and affirmed the PTO's Final Decision. Petitioner next appealed to the Court of Appeals for the Federal Circuit, which in turn, affirmed the District Court's ruling on June 21, 2007. Petitioner timely filed a Request for Rehearing and Request for *En Banc* Review which was denied on September 27, 2007.

REASONS FOR GRANTING THE PETITION

This Court's review is sought to clarify the jurisdictional limits of federal agency authority to discipline practitioners before that agency; to resolve a conflict between sister Circuit Courts over the use of

investigative interrogatories in federal agency administrative disciplinary proceedings; to reaffirm fundamental principles of procedural due process in such proceedings; and to vacate a clearly erroneous decision by the lower court.

I. The Federal Circuit Erroneously Ruled That The PTO's Own Interpretation Of The Patent Statute With Respect To What Constitutes "Practice Before The Office" Was Entitled To Deference

Under the Tenth Amendment, the State has exclusive rights to "police" attorneys within its borders. Insofar as any federal preemptive rights are conferred by Congress with respect to the recognition and conduct of attorneys or agents before the Patent Office, those rights are circumscribed by the federal objectives of the agency. *Sperry*, supra at page 402 ("Since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives."). In 1985, the PTO published a final rule containing the disciplinary regulations governing this case.[7] The promulgated regulations "govern solely the practice of patent, trademark, and other law before the Patent and Trademark Office (37 CFR § 10.1). The rules fail to define the term "practice before the Office. The rules do define "proceeding before the Office" as

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[7] Federal Register, Vol. 50, No. 25, February 6, 1985, page 51578 et seq.

including "an application, a reexamination, a protest, a public use proceeding, a patent interference, an *inter partes* trademark proceeding or any other proceeding which is pending before the Office" (37 CFR § 10.1(s)); and "Legal service" as "any legal service which may lawfully be performed by a practitioner before the Office" (37 CFR § 10.1(n)).

In the present case, the PTO gave the undefined term "practice before the Office" an overly expansive interpretation to cover conduct not reasonably related to any proceeding pending before the PTO. The PTO could not have charged Petitioner with misconduct in a "proceeding before the Office" because the Federal Circuit already held in *In re Daniels*, supra, that with respect to such matter (the pending "Gilden" design patent applications) Petitioner's conduct was beyond reproach, and if anything it was the PTO that engaged in misconduct. The found ethics violations in this case are overly technical in character and reflect nothing more than "out of the Office" errors in judgment. Thus, with respect to the "conflict of interest" charges, Petitioner is accused of not making disclosures relating to the "guarantee clause" in the AIC contract and/or the amount of legal fees paid to Petitioner by AIC. Similarly, the found ethics infractions with respect to "neglect" relate to the adequacy of Petitioner's "engagement letter" to his clients or to the "promptness" of mailing Office Actions to his clients; errors of judgment -- perhaps bad judgment -- but nevertheless not ethical misconduct in connection with a *proceeding pending before the Office*.[8] Even the

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[8] See *Kroll v. Finnerty*, 242 F.3d 1357 (Fed. Cir. 2001) at page 1365. There, the Federal Circuit held that conduct involving

"evasive" answers alleged to have been given by Petitioner in response to an OED RFI were given in response to questions enquiring about his relationship with an invention marketing company; these questions do not relate to a matter pending before the PTO.

The Federal Circuit and the District Court erroneously gave deference to the PTO's overly expansive interpretation of the term "practice before the Office" under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). No such deference is deserving. The plain language of the statute limits the PTO's broadest specific powers to "establishing regulations which shall govern *the conduct of proceedings in the Office.*" (emphasis added). 35 U.S.C. § 2(b)(2)(A). Neither lower court considered the latter provision in their respective deliberations. Moreover, Congress did not confer any substantive rule making powers upon the PTO. See *Merck & Co. Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996). And, the PTO lacks administrative expertise in attorney discipline matters. *Chevron* supra at page 865, *Martin v. OSHRC et al.*, 499 U.S. 144 (1991) at page 151. Without the benefit of deference, the statute plainly restricts the PTO's statutory authority solely to disciplining practitioners for misconduct in "proceedings before the Office." This is in accord with judicial precedent. In the few reported appellate decisions involving practitioners disciplined by the PTO, all have involved misconduct in proceedings

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communications with a client, specifically failing to notify a client about a Final Rejection, was properly the subject matter of the State Bar Authority because it is the type of conduct "outside the federal objectives of the PTO."

before the Office. See *Kingsland v. Dorsey*, 338 U.S. 318 (1949), (false affidavit filed in a pending application); *Klein v. Peterson*, 866 F.2d 412, 414 (Fed. Cir. 1989), (false mailing certificates in connection with filing papers in applications); *Jaskiewicz v. Mossinghoff*, 822 F.2d 1053, 1058 (Fed. Cir. 1987) (applications filed with improper declarations and deliberately misleading answers given in reply to an OED RFI); and *Lipman v. Dickinson*, 174 F.3d 1363 (Fed Cir 1999), (misleading affidavit filed in connection with an application to register a practitioner). Also in accord is a prior notice of the PTO. See 1985 published Final Rule,[9] wherein the PTO solicitor States: "This provision of § 10.1 is based on language in *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 402 (1963) and makes clear the PTO's intent to *regulate only conduct related or relevant to practice before the PTO.*" (Emphasis added.)

Inasmuch as the found core ethics violations in this case do not reasonably comprise conduct in connection with "proceedings before the Office," they are exclusively the province of the Bar Authority in the State or States where Petitioner is admitted and under *Sperry*, any attempt by the PTO to usurp that State Bar Authority is a violation of the Tenth Amendment of the U.S. Constitution. *Sperry* at page 403 ("The Tenth Amendment states but a truism that all is retained which has not been surrendered"]. Notwitstanding, because none of the core charges constitutes unethical conduct in a "proceeding before the Office," the PTO lacks the statutory authority to

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[9] Federal Register, Vol. 50, No. 25, February 6, 1985, at page 5158.

disbar Petitioner in any event under the Fifth Amendment of the U.S. Constitution.

Moreover, while § 32 permits "exclusion" for "violation of any promulgated rule," the statute also contains the requirement that there be a showing of incompetence, or disreputable or gross misconduct. These words give "color" to any such rule violation. Therefore, any reasonable interpretation of the statute requires that the rule violation supporting "exclusion" be akin to "gross misconduct," a burden the PTO has not carried in the present case. To rule otherwise leads to the unreasonable and absurd result that the PTO may disbar for any innocuous violation of its enacted rules whatsoever.

There is an inherent conflict between a federal agency's discharge of its administrative or regulatory function and the power of that agency to discipline practitioners recognized to practice before it. In this case, Petitioner was placed under disciplinary investigation immediately after he agreed to represent in good faith the inventors of more than 1,000 pending design applications after their original attorney became suspended. The evidence in the record is clear and convincing that Petitioner was targeted for discipline merely because of doing so. See Deputy Commissioner Kirk's public statement supra. The Federal Court's decision is a dangerous precedent because it is a "chilling factor" discouraging members of the patent bar from taking over the cases of inventors tainted by a prior disciplined attorney. This is especially true with customers of invention marketing companies because their attorneys are chronically targeted for discipline as a result of PTO

policy. There is nothing in the legislative history of the Patent Act insofar as Petitioner is aware to indicate that Congress intended the PTO to become a "federal" State Bar Authority with expanded plenary disciplinary jurisdiction. If the PTO has information that an attorney has mis-conducted with respect to matters that are not reasonably related to "proceedings before the Office," the PTO may easily refer that information to the State Bar where the attorney is admitted. The resources the PTO would expend administering such a "federal" State Bar Authority -- even if it had the expertise which clearly it does not -- would be better spent reducing the ever mounting Patent Office backlog.[10]

II. The Federal Circuit's Decision Directly Conflicts With The Fourth Circuit Court Of Appeals Ruling With Respect To The Inappropriate Use Of OED RFI's By The PTO

Almost immediately after Petitioner agreed to assume prosecution responsibility for the pending "Gilden" design applications, Petitioner was subjected to a steady stream of OED RFIs (App. *infra*. page 23a). Each RFI contained the same threat of non-compliance as follows: "Failure to respond and answer the questions can be construed as a failure to cooperate, and can be submitted to the Committee on Discipline

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[10] "... the backlog, has been growing for over 15 years -- since fiscal year 2002 alone, the backlog has increased by nearly 73 percent to about 730,000 applications." Excerpt from page 1 of report by the U.S. Government Accountability Office, No. GAO-07-1102 U.S. Patent and Trademark Office, September 4, 2007.

for appropriate action." Once an attorney's case is submitted to the Committee, a § 32 administrative disciplinary proceeding invariably results. 37 CFR § 10.132(a) and (b). For many years, the PTO's OED has used such RFIs to harass and intimidate attorneys who choose to accept referrals from invention marketing companies. See comment letter from Advent Product Development, Inc. posted on the PTO web site at *www.uspto.gov/web/offices/pac/dapp/opla/comments/oedrep/advent.html*, and comment letter posted by attorney Richard W. Goldstein at *www.uspto.gov/web/offices/pac/dapp/opla/comments/oedrep/goldstein.html*. Because of the threat of a disciplinary proceeding, and the lack of any avenue of challenge, most attorneys receiving an OED RFI become "terrorized" and immediately agree to cease accepting invention company referrals. Thus, the PTO, with a little ink and a word processor or two, can efficiently and effectively deny to an entire class of inventors "valuable legal services."

In *Goldstein v. Moatz*, supra, the Fourth Circuit struck down the obnoxious use of the PTO's OED RFIs by ruling that the investigator issuing such interrogatories was not entitled to absolute immunity in a "Bivins" action brought prior to initiation of a § 32 disciplinary proceeding. The Court reasoned that RFIs directed at a respondent in a PTO disciplinary proceeding and the information obtained therefrom, whether relied upon by the PTO to support a § 32 proceeding or not, constitute "improper discovery" under the PTO's own disciplinary rules. Those rules permit discovery only after a § 32 proceeding is brought and then, only under the supervision of an ALJ. *Goldstein* at page 218.

The facts in *Goldstein* are virtually identical to those here. Attorney Goldstein was a patent practitioner who represented invention marketing company clients in the PTO and came under disciplinary investigation. After being subjected to multiple RFIs directed at him by OED, Goldstein brought a *Bivins*-type civil damage suit against Mr. Harry I. Moatz, the PTO investigator and other PTO officials alleging that his constitutional rights were violated by the abusive harassing use of the RFIs. The PTO motioned for dismissal claiming their employees were protected by absolute immunity. The Fourth Circuit held that as to non-discretionary acts performed during the investigative stage of the PTO disciplinary scheme no absolute immunity applies. In support of its ruling the court held that the RFIs employed by OED during the investigative stage were "improper discovery" of an attorney being disciplined because the rules of the PTO permit RFIs only in connection with the prosecution of patent applications, and that *discovery of a Respondent in disciplinary cases* is permitted (under the disciplinary rules) only after a § 32 proceeding is brought and then, and only then, under the supervision of an ALJ.

The Fourth Circuit stated that the PTO's OED RFI practice "utterly lacked procedural safeguards" protecting Goldstein's rights and his clients' secrets. *Goldstein* at page 217. The court specifically agreed with attorney Goldstein that "the denial of any avenue of challenge, and the threats of charges for non-compliance, are "indicative of a system lacking sufficient procedural safeguards." *Id.* In the present case, the "evidence" allegedly supporting the found charges was presented to the Disciplinary Committee.

37 CFR § 10.4(b). Much of that "evidence" consisted of information "discovered improperly" from Petitioner through or by one or more OED RFIs. *Ipso facto*, under the rationale of *Goldstein*, the PTO's Final Decision disbarring Petitioner represents an "improper taking" under the Fifth Amendment and should be vacated for this reason alone.

The Federal Circuit's decision in this case is directly contrary to *Goldstein*. Rather than adopt the reasoning of its sister Circuit, the Federal Circuit, in stark contrast, held that the OED RFIs were not necessarily unconstitutional relying upon this Court's decision in *Hannah v. Larche*, 363 U.S. 420 (1960). In *Hannah*,[11] the Civil Rights Commission's *interrogatories* at issue did not contain any explicit "threat of non-compliance" and were in accordance with that agency's rules designed to promote its purely investigatory and fact-finding function. In the present case, the PTO lacks rules permitting the OED RFI's and there is no way for an attorney to protect himself from its adverse consequences or from being abused and harassed. As stated by the majority in *Goldstein* at page 219, "[U]nder the OED's current system, nothing but good conscience would prevent an OED investigator from requiring responses to an unlimited and burdensome array of questions ... and bringing charges against an attorney who fails to comply." This is corroborated by the facts of the present case where no less than about 20 OED RFIs were directed at

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[11] By relying on *Hannah*, the Federal Circuit adopted the dissenting opinion in *Goldstein* thus exacerbating the split between the Circuits.

Petitioner over the five year period 1993-1998, and the preponderance of these RFIs never were used to support any ensuing disciplinary charges. They merely vanished into thin air after Petitioner expended countless hours and treasure in responding to "unlimited and burdensome questions." The conflict over the question of whether the PTO's OED RFIs comply with due process "under the OED's current system" should now be resolved by this Court. Otherwise, patent practitioners will continue to be exposed to abusive or unwarranted use of such "subpoenas" and be compelled to either seek private law suits or invoke the right against self-incrimination in order to "protect his client's secrets" or to "challenge unduly burdensome discovery" not countenanced by the PTO's rules.

III. The Federal Circuit's Decision Ignores Petitioner's Argument That The "Evasion" Charge Violates Procedural Due Process

The Federal Circuit held that substantial evidence supports the PTO's charge that Petitioner's actions were prejudicial to the administration of justice under 37 CFR § 10.23(b)(5) because he failed to give "meaningful answers" to two questions in the OED RFI of September 18, 1998 (App. *infra*. pages 14a-15a). It is a clear denial of procedural due process to add a new charge in an attorney disciplinary proceeding after the administrative hearing. *In re Ruffalo*, 390 U.S. 544 (1968) (Lack of notice that [Petitioner's conduct] would be considered a disbarment offense deprived Petitioner of due process). See also APA § 554(b)(3). Petitioner learned for the first time that answers he gave to certain specific questions were

considered to have been "evasive" -- whatever that indefinite term means -- when he read about it in the ALJ's Initial Decision. Nowhere in the exclusive administrative record of this proceeding is there any mention of specific OED answers that were answered evasively by Petitioner. This issue was not pleaded, litigated or proved by any evidence whatsoever, let alone clear and convincing evidence. Petitioner never has had an opportunity to defend against the charge of "evasive" answers given to specific OED RFI questions. The ALJ did not support his *sue sponte* conclusion with reference to any evidence in the record (there is none) and merely gave his personal opinion acting as it were as "a member of the prosecution team." See *NLRB v. Tamper*, Inc. 522 F.2d 781, 790 (4th Cir. 1975).

In the Final Decision, the PTO's General Counsel merely adopted the finding of the ALJ without any supporting analysis. The Federal Circuit's conclusion regarding "lack of meaningful answers" is not supported by any reference to the record and merely substitutes the court's own thinking for that of the administrative agency. This Court has consistently held that such *post hoc* rationalizations are improper. *S.E.C. v. Chenery*, 332 U.S. 194, 196 (1947). See also *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 169 (1962) ("For the court to substitute their or counsel's direction for that of the agency is incompatible with the orderly functioning of the process of judicial review.").

Finally, and in any event, 37 CFR § 10.23(b)(5) is impermissively vague and indefinite and does not specify that "otherwise evading answering" questions in an OED RFI is misconduct. Nor is "evading

answering" an OED RFI question specifically set forth as being a violation of any other provision of the current disciplinary rules. The language of the RFI itself states that "Failure to respond and answer the questions *can be construed as a failure to cooperate*, and can be submitted to the Committee on Discipline for appropriate action" citing 37 CFR § 10.131(b) ("A practitioner shall cooperate with the Director...;" and 37 CFR § 10.23(c)(16) ("Willfully refusing to reveal ... to the Director contrary to 37 CFR § 10.24 or paragraph (b) of 37 CFR § 10.131). Petitioner has not been charged with "failing to cooperate" or of violating any of these rules. Nor could he be so charged, having answered every one of the about 112 questions posed in the OED RFI. In sum and substance, the PTO disciplinary rules do not fairly require any duty to provide "non-evasive" or "meaningful" answers to an OED RFI, whatever those indefinite terms may mean. The rules only require a "duty to cooperate," a violation of which Petitioner has been exonerated.

The proposed new disciplinary rules (Part 11) give clear support to Petitioner's position by adding new rule § 11.22(l) which specifically makes "evading answering to an OED RFI" a possible ground of misconduct under § 11.804(d). As mentioned, no such specific rule is contained in Part 10, the rules governing this proceeding

IV. The PTO's Final Decision Violates The "Separation Of Functions Clause" Of The Administrative Procedures Act

Under the APA, section 554(d)(2) provides that "[a]n employee "engaged in the performance of

investigative functions for an agency in a case may not, in that case, ... participate in the decision or agency review pursuant to section 557." Following his promotion to OED Director, and more than 6 years after he began to investigate appellant, Mr. Moatz "initiated" the § 32 disbarment proceeding in this case by calling for the Disciplinary Committee to meet and deliberate charges of probable cause against appellant (August 1999). This function of the Director of OED is clearly a discretionary one because it is protected by absolute immunity. *Butz v. Economou*, 438 U.S. 478 (1978) (Officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity.). That discretionary act, viz. "turning the case over to the Disciplinary Committee," clearly constituted "participation" under the APA because it was an "adjudication" triggering the § 32 proceeding seeking disbarment in this case, and therefore became "part" of a final disposition. 5 U.S.C. § 551(6). It is incomprehensible that the PTO did not consider recusal of Mr. Moatz before initiating the present suit under § 32. See *Morrisey v. Brewer*, 408 U.S. 471, 485 (1972) (parole officer directly involved in case cannot constitutionally determine whether reasonable grounds exist to revoke parole ... "due process requires that ... the determination that reasonable ground exists for revocation of parole *should be made by someone not directly involved in the case*" (emphasis added). The Federal Circuit's decision egregiously overlooks that Mr. Moatz' direct participation in virtually every aspect of this case clearly violated Petitioner's due process rights. This is especially so given the facts that the PTO harbored an intense institutional bias against invention marketing

companies in general, and against Petitioner in particular; Mr. Moatz was so deeply embedded in this case as an investigator; Petitioner complained to Mr. Moatz' superior regarding the investigator's improper conduct (App. *infra*. page 81a); and Mr. Moatz co-authored the PTO's proposed new Disciplinary Rules (Part 11) making several of the violations alleged in this case specific grounds of misconduct. Only by the PTO's interpretation have the Part 10 rule violations been found in this case. In *Withrow v. Larkin*, 421 U.S. 35, 58 (1975), the Court stated that a court is not precluded "... from determining, from the special facts and circumstances present in the case before it, that the risk of unfairness is intolerably high." This is that case.

V. The Federal Circuit Shirked Its Review Responsibility Under The Administrative Procedures Act

The Federal Circuit's review responsibility in this matter is set forth in 5 U.S.C. § 706(2). Under that section of the APA, courts are required to "hold unlawful and set aside agency action ... found to be ... arbitrary, an abuse of discretion, or otherwise not in accordance with law. *Dickinson v. Zirko*, supra. The statute includes the word "shall" and is mandatory upon the reviewing court. The Federal Circuit erred by failing to rule that the penalty of "exclusion" in this case is "otherwise not in accordance with law" because it is barred by the federal statute of limitations set forth in 28 U.S.C. § 2462. That statute holds that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced

within five years from the date when the claim first accrued." In *Sheinbein v. Dudas*, 465 F.3d 493 (Fed. Cir. 2006), the Federal Circuit distinguished application of the § 2462 time bar because the "claim" in *Sheinbein* did not accrue before the critical date. Here the critical date is June 20, 1995. It is beyond dispute that the core violations of "conflict of interest" and "neglect," which the Federal circuit found supported by substantial evidence all occurred prior to the critical date. Indeed, in September 1994, long before the critical date, the Deputy Commissioner of Patents made a public proclamation that "steps have already been taken to remove [Petitioner] from the rolls." There can be no substantial evidence of alleged violations that are "otherwise contrary to law."

In the District Court, Petitioner argued (as he had consistently during the administrative proceeding below) that the "extraordinary undue delay" in this matter devastatingly prejudiced Petitioner because the PTO's investigator eventually was promoted to Director of OED and as Director of OED, then was able to initiate suit by "turning the case over" to the Disciplinary Committee. See 37 CFR § 10.132(a) and *District Court Memorandum*, App. *infra*. pages 81a-82a. The District Court could have and should have applied § 2462 to the facts of this case once Petitioner raised the "undue delay" argument because precedential law of the District Court's reviewing appellate court, set forth in *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) and *Johnson v. S.E.C.*, 87 F.3d 484 (D.C. Cir. 1996), holds that § 2462 applies in an administrative proceeding seeking to revoke a license where, as here, the agency statute is devoid of any time limits by which the revocation proceedings must

be commenced. By the same token, the Federal Circuit, in discharge of its *de novo* review responsibility could have and should have applied § 2462 to the facts of this case, particularly in view of the Federal Circuit's prior decision in *Sheinbein*, and the raising of the very same issue by Petitioner in his Supplemental Brief, ordered by the Federal Circuit (App. *infra*. page 8a). Whether § 2462 confers a federal right upon Petitioner under the facts of this case is a pure question of law which *must* be resolved *de novo* on appeal and the appeals court should use its own or other relevant precedent, not simply those cited to or used by the District Court. *Elder v. Holloway*, 510 U.S. 510 (Sup. Ct. 1994). The Federal Circuit's failure to consider and apply § 2462 to the facts of this case clearly is erroneous and constitutes justice miscarried.

CONCLUSION

For the reasons given above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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